No. 942.

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JAMES H. McKE

SUPREME COURT

OF THE

TERRITORY OF UTAH.

ON THE RELATION OF THE ATTORNEY GENERAL OF THE TERRITORY OF UTAH,

Plaintiff,

vs.

JOHN TAYLOR, ET AL.,

Defendants.

Brief of Appellant's Attorney, Young, et. al.

LE GRAND YOUNG,

Attorney for Appellants.

Deseret News Print, Salt Lake.

IN THE

SUPREME COURT

OF THE UNITED STATES.

IN THE MATTER OF THE ESTATE OF OSCAR A. AMY, Deceased, ADELIA YOUNG CEDENIA YOUNG and DELECTA MASTON,
Appellants.

vs.

JENNIE AMY,
Respondent.

Brief of Appellant's Adelia Young, et. al.

The controversy in this case arose over the estate of the late Oscar A. Amy, who died intestate in Summit County, then Territory of Utah, on the 26th day of May, 1891, leaving surviving him neither father nor mother, or sisters or brothers of the whole blood, or children or wife, as appellants claim.

His estate was duly administered in the county where he resided, and at the time of the distribution there appeared three sets of claimants for his property before the court:

First, Royal D. Amy, et. al. the half brothers and sisters of Oscar Amy, deceased, and children of his father by a former wife.

Second, his three aunts, namely, Adelia Young Cedelia Young and Delecta Maston sisters of his mother.

Third, Jennie Amy, who claimed to be his wife.

The probate court decided in favor of his three maternal aunts, holding that the property, having come from the ancesters of the deceased's mother Royal D. Amy, et. al. could not inherit it; and also holding that the said Jennie Amy was the wife of one Elliot Butterworth, from whom she had never been legally divorced, and therefore was not the wife of Oscar A. Amy at the time of his decease although a marriage ceremony was proven to have been performed between the said Oscar A. Amy and Jennie Amy some time in the year 1896.

The case was appealed to the third judicial district court Honorable S. A. Merrit presiding, and was there tried anew on the 18th day of January 1895, resulting in a judgment in favor of

said aunts of said deceased Oscar A. Amy, namely Adelia Young, Sadenia Young and Delecta Maston; see printed Transcript page ———. The case was appealed by the said Royal D. Amy, et. al. and also by Jennie Amy to the supreme court of the then territory of Utah, and there the decision of the district court was reversed and the property was awarded to Jennie Amy, the court holding that she was the legal wife of Oscar A. Amy, deceased at the time of his death, and that she was not the wife of Elliot Butterworth having been divorced from him by the probate court of Washington County, Utah, in September, 1879; from which decision of the supreme court of the territory of Utah, Adelia Young, Sedenia Young and Delecta Maston has appealed to the supreme court of the United States; Royal D. Amy et. al. gave no notice of appeal and therefore that portion of the proceedings being the basis of their claim, will be omitted as far as practical in the argument of this case.

The record discloses the following facts; see findings of fact Transcript page 1 to 4.

First, that Levira C. Smith Amy, come to Utah in an early day, and settled upon a piece of ground the subject of this controversy, described

as follows, to-wit; a portion of lots one and two, block 70, plat "A" Salt Lake City Survey, Utah Territory, described as follows, to-wit: commencing 49½ feet south from the northeast corner of said lot one, thence south three rods; thence west eleven rods; thence north three rods; thence east eleven rods; to the place of beginning.

That when the township was entered by the mayor, pursuant to an act of the legislature of Utah, Levira C. Smith filed upon the land, obtained a title to it, and continued to reside there until she died in 1883. She left surviving her, said Oscar A. Amy, aged about twenty-five years, and also a daughter Levira A. Smith aged about forty years by a former husband, Samuel Smith; also leaving surviving her said three sisters, namely, Adelia Young, Sadenia C. Young and Delecta Maston.

The two children Levira A. Smith and Oscar A. Amy continued to occupy the home of there mother until 1888, when Levira A. Smith died, leaving no relatives that claim this property so far as this case is concerned, except Oscar A. Amy who succeeded to her right therein.

Oscar A. Amy continued to hold the property until his death, in 1891, as above set forth. He

left surviving him his said three aunts, sisters of his mother but left no children, or brothers or sisters of the whole blood, but in the year 1886, a marriage ceremony was performed between himself and the said Jennie Amy, or Mrs. Jane Butterworth, as she had been up to that time known.

It will be observed by turning to the testimony (see page 4 of Transcript,) that respondent herself on the witness stand stated that she had been married to one Elliott Butterworth in Washington County, in the year 1875, and that afterwards Elliott Butterworth moved out of the Territory of Utah into the Territory of Idaho, and there he remained, and that in the year 1879, (see pages 4 to 13 of printed Transcript,) she begun proceedings of divorce against her husband in the Probate Court of Washington County, Territory of Utah.

It will be observed by turning to the record that the alleged wife of deceased, Jennie Amy, introduced certain papers to sustain her claim of divorce from her former husband, namely, the complaint and the decree of court (see pp. 5, 12 and 13 printed Transcript.) These two papers constituted what the alleged wife claimed to be the record in the divorce proceedings, printed Transcript page 4. There being no summons in the record.

She also introduced in evidence a copy of the Silver Reef Miner, a semi-weekly newspaper, claimed to have been published Wednesday's and Saturday's in Silver Reef, Washington County, Utah, dated the 30th of July, 1879, which newspaper contained, she alleged, the publication of summons (see pages 4, 5, 6 and 14 printed transcript) and she also introduced five other papers, claimed to be clippings from this same paper or other issues of it, and marked "Jennie Amy's Exhibits D, E, F, G and H." (see page 14 of printed record.) All of these exhibits were duly objected to as being irrelevant, immaterial and incompetent to establish the alleged divorce.

Jennie Amy went upon the witness stand and testified (see printed record) under the objection of the said Adelia Young, et. al. as to the relevancy, materiality and competency of such testimony, to the effect that she saw a summons in the case. Respondents then placed upon the witness stand Elliott Butterworth, who was allowed to testify over the objection of appellant, that he received through the mail, a summons in "a letter from the court in Washington County, Utah, and that he also received a paper through the mail, the Silver Reef Miner," in

which was a printed summons; see Transcript pages 6, 7 and 8 and Jennie Amy's Exhibit C; D, E, F and G, page 14 printed Transcript. To all of which testimony and evidence appellant's duly objected on the ground that the same were wholly irrelevant, incompetent and immaterial; see printed Transcript, page 22.

The appellant's in the Supreme Court of Utah, (Royal D. Amy, et. al.) introduced in evidence the whole record of the divorce proceedings of Jane Butterworth vs. Elliott Butterworth; see Royal D. Amy's Exhibit 4, page 15 of printed Transcript.

Under this brief statement of facts, and as they are more fully shown in the findings of fact by the Utah Supreme Court and by the evidence on which they are based, the question is presented who are the heirs of Oscar A. Amy, deceased, and who are entitled to inherit his property?

The said Jennie Amy, as before said claims to be the widow of Oscar A. Amy, and entitled to the whole of his estate. This question was decided in the negative by the Probate and District Courts, holding that she was not the widow, having never been legally divorced from her former husband, which she admits she had, and that the maternal aunts, namely, Adelia Young, Cedenia C. Young

and Delecta Maston, the full sisters of the mother of said deceased, Oscar A. Amy, inherited his property. The Supreme Court of Utah reversed District Court, holding that Jennie Amy had been legally divorced from Butterworth and that she was the widow of Oscar A. Amy.

The questions now before this court is, did the Supreme Court of Utah properly interpret the law? The claim of the appellants is that Jennie Amy was the wife of Elliott Butterworth, and that the divorce proceedings between these parties in the Court of Washington County were void, for the reason that the court never had jurisdiction of the person of said defendant, neither constructive or otherwise. The facts are, it is admitted on all sides, the said Butterworth resided in Idaho, and not in the Territory of Utah; and there is no pretense that he was served by a summons in the usual manner or at all. There was no pretense that he was in the jurisdiction of the court at all during the divorce proceedings. But Respondents claim that the jurisdiction was obtained by special proceeding under the statutes of Utah Territory then in vogue, to-wit: Sections 1255–6, Compiled Laws of 1876, being the code of Civil Procedure adopted in the Territory of Utah, approved February 17, 1870.

These two sections above referred to read as follows:

"(1255) Sec. 30. When the person on whom the service is to be made resides out of the Territory, or has departed from the Territory, or cannot after due diligence be found within the Territory, or conceales himself to avoid the service of summons, or being a corporation, or joint stock association, cannot be served as provided in section twenty-nine, and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of summons."

"(1256) Sec. 31. The order shall direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served. If any defendant is a non-resident of the Territory, but has an agent therein, service may be made upon him by serving the same on such agent, or by leaving a copy thereof at his usual place of business with any person in charge thereof. When any defendant is a non-resident,

or his residence is unknown, and has no known agent or place of business in this Territory, service may be made by publication in some newspaper printed in and having general circulation in the Territory, which publication must contain the names of the parties, plaintiff and defendant, to the complaint, a statement of the objects thereof, the name and style of the court in which the same is filed, and also notify the persons thus to be served when they are required to answer; said publication shall be inserted four times consecutively; the first insertion shall be at least forty days before the time of answer, and a copy of which shall be immediately deposited (post paid) in the postoffice, directed to the defendant or defendants at their last known place of residence or business. In actions on contracts for the direct payment of money, the court in its direction may after publication, appoint an attorney to appear for the non-resident, absent or concealed defendant, to conduct the proceedings on his part. The return of the officer serving the process as to any fact required by law for him to show on such return, either on mesne or final process, shall be prima facie evidence of the truth of such facts."

Then Section 1258 on the same page pro-

vides that the proof of the service of the summons shall be, if served by the Territorial marshall, or the sheriff, his certificate etc. In case of publication the affidavit of the publisher, his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post office, if the same shall have been deposited.

These are the sections that apply to the making and proof of service by publication, and the first question to be discussed is, did the respondent Jennie Amy, comply with the law? As I said above, the respondent's introduced in evidence a portion of the record in the divorce case of Butterworth v. Butterworth, namely the complaint and decree. The appellant objected to the introduction of these papers on the ground that they were immaterial, irrelevant and wholly incompetent, for the reason that plaintiff did not allege that she was a resident of the county as the statute required; but most of all, that there was no order for publication, nor was there any affidavit of the printer or publisher, none at least that respondent's offered to introduce in evidence. There was an affidavit of the publisher of the Silver Reef Miner, among the divorce papers, (see printed Transcript p. 15,)

but it was so defective that respondent's did not attempt to put it in evidence, claiming that the affidavit of the printer must be lost. To supply this plainly defective record and especially to prove serivce on defendant, respondents placed the said Elliott Butterworth on the witness stand as above noted, who testified that he lived in Idaho at the time of the alleged divorce; see printed Transcript pages 6, 7 and 8; and that he had received by mail certain copies of the Silver Reef Miner, a newspaper in which was printed a copy of a summons, and that he received this paper while a resident of Idaho; see Jennie Amy's Exhibits C, D, E, F and G; page 14, printed Transcript.

The Supreme Court of the State of Utah, see Justice King's opinion, page 29 of the printed Transcript, on the facts before it, decided substantially that:

1. That the Probate Court of Washington County was a court of general jurisdiction.

2. That the decree rendered in the case makes recitals of service by publication upon the defendant, and that said decision cannot be impeached in a collateral proceeding.

3. That the record imports verity, and

that none of the papers which may be found in the files can be received to contradict recitals of due service.

4. That service by publication is a regular method of getting jurisdiction over an absent defendant, and that all the presumptions are in its favor that would be had by a court where defendant has been served within the jurisdiction thereof. In other words, there is no exception to the rule that a decree reciting the fact that a summons has been duly served, whether served by the sheriff by personal citation or by advertisement through a newspaper, it is binding on every body.

5. That parties who have nothing to do with the record and are not privies to it are bound by it just the same as persons who are privies to the record.

6. That a defective record can be cured by oral testimony.

7. That although the record upon the face thereof shows the want of jurisdiction over the person yet the recital of due service by publication is conclusive on all persons and all parties, although the recital is disputed in the record itself.

8. The court substantially held it was collaterally attacking the alleged divorce pro-

ceedings to call upon Jennie Amy, the respondent herein, to show that service was had on the defendant, in Butterworth vs. Butterworth, in accordance with the statute of Utah at that time, although the said Jennie Amy, who is seeking to introduce it in evidente is the one who expects to derive all the benefit under it.

9. That in proceedings under a statute like the one of Utah, 1876, Compiled Laws, Sections 1255, 1256, 1258, and herebefore set out at large in this brief, it is not necessary that there should be any order for publication, nor indeed necessary that there should be any affidavit of the printer or publisher as required by Section 1258, supra.

10. The Supreme Court of Utah substantially holds that notwithstanding they base their opinion on the inviolable and impeachable character of the judgment that recites the fact that it had jurisdiction. I say notwithstanding the recital and the holding of the Supreme Court, that it cannot be questioned, still the court recognizing the patent defect of the pretended judgment allows evidence outside of the record, oral testimony, to be taken, to show that service of summons was had, recognizing the fact that nothing in the record disclosed such service, and recognizing the fact that the

recital in the judgment itself is not sufficient guaranty for the position they take.

On these peculiar holdings, after the decree was entered in the Supreme Court the appellants Adelia Young et.al. made the following assignment of errors:

1. The Supreme Court of Utah erred in admitting and considering the evidence of Jennie Amy's Exhibit A.

2. Said Court erred in admitting and considering Jennie Amy's Exhibit B.

3. Said Court erred in admitting and considering Jennie Amy's Exhibit C.

4. Said Court erred in admitting and considering all three of the exhibits together.

5. Said Court erred in admitting and considering Jennie Amy's Exhibit D.

6. Said Court erred in admitting and considering Jennie Amy's Exhibit E.

7. Said Court erred in admitting and considering Jennie Amy's Exhibit F.

8. Said Court erred in admitting and considering Jennie Amy's Exhibit G.

9. Said Court erred in admitting and considering Jennie Amy's Exhibit H.

10 The said Court erred in admitting and con-

sidering the oral testimony of Jennie Amy in proof of her alleged divorce.

11. The Court erred in admitting and considering the oral testimony of Elliot Butterworth in support of said divorce.

12. Said court erred in rendering judgment in favor of Jennie Amy and against the said Adelia Young, et. al.

13. The said court erred in holding that the burden of proof was on Adelia Young, et. al. to show that said pretended judgment of divorce was void.

14. The said court erred in holding that said pretended judgment in the Probate Court of Washington County cannot be attacked collaterally in an action of this sort.

15. The said court erred in holding that Jennie Amy was lawfully divorced from Elliott Butterworth by the proceedings in the Probate Court of Washington County.

16. The said court erred in deciding in favor of Jennie Amy, that she was the widow of Oscar A. Amy, deceased.

17. The said court erred in holding it was collaterally attacking the alleged divorce of Jane Butterworth or Jennie Amy, for the reason that

she, like any other person claiming to be the heir of Oscar A. Amy, was bound to show her right to inherit it, and the burden of proof was on her to show this.

18. The court erred in holding that Adelia Young, et. al. could not question said divorce proceedings introduced in evidence by Jane Butterworth, re Jennie Amy, and in holding that it was collaterally attacking said pretended divorce proceedings by requiring her to affirmatively show her legal right to inherit the property of Oscar A. Amy, deceased.

19. The said court erred in admitting the evidence, "Exhibit 4," of Royal D. Amy, et. al. or any part of said pretended record.

20. The court erred in holding that the affidavit of the publisher of the Silver Reef Miner was sufficient.

21. The said court erred in holding that it was not necessary that there should be an order of the court directing publication.

22. The said court erred in holding that the only papers necessary in proof of publication were the complaint, summons, and affidavit of the printer, and judgment.

23. The said court erred in holding that said

Probate Court prior to 1874, or ever possessed common-law or chancery jurisdiction.

24. The said court erred in holding that the said Probate Court of Washington County, Territory of Utah, was a court of general jurisdiction.

The questions that were discussed under these errors may be resolved in about seven or eight.

1. Can a record of a court that is fatally defective upon its face be inquired into by a person not a party to it when such record is introduced or is sought to be introduced in evidence in any case?

2. When a party seeks to introduce in evidence a record of a court of limited jurisdiction, or indeed of general jurisdiction which record shows upon its face that the defendant is a non-resident of the state or territory where the court has jurisdiction can the fact that such a record is defective, and shows no service upon the defendant, be inquired into and attacked by a party who is not a party to or privy of said record?

3. When a party introduced a record of a court as evidence in a case claiming a benefit under it, is it competent for the opposite party not privy to said record to attack it for material defects appearing upon its face?

4. Can oral testimony be received to establish service of a court upon a non-resident defendant where the record shows no such service?

5. It is not every person who claims to be an heir of a deceased party when challenged bound to produce evidence to support his or her claim to such heirship?

6. Is not a court who seeks to obtain service on a non-resident defendant bound to strictly conform to the prescribed requirement of the statute to obtain such service, and must not the record affirmatively show that service has been had in accordance with the statute, and if the record fails to show that can not any person who is not a party or privy to it attack it especially when the person introducing it in evidence in another case is seeking a benefit under it?

7. Is not a record that shows upon its face as does the one in evidence, (see Exhibit No. 4) Royal D. Amy, printed Transcript p. 15, that no service was ever had, different from one that is absolutely silent upon that subject?

8. Is there not a material difference between a decree or judgment that recites, that due service was had and is silent how it was had, and one that recites that due service was had by

publication and the record not only does not show that fact put disputes it?

The part of the divorce record offered by plaintiff, viz: the complaint and decree does not show where defendant Butterworth did reside; but by the whole divorce record introduced by the attorneys for Royal Amy et.al. see printed transcript page 15, the fact is disclosed, and, indeed, Mrs. Amy said her husband Butterworth lived in Idaho; and therefor, of course, no process issuing from the Probate Court in Washington county, Utah, could assume to reach him; and here all presumptions cease as to the validity of the judgment, and the burden of proof is on the applicant who introduced the judgment and who claimed under it to show that constructive service was had in harmony with the statutes made in such cases. Turning to the record in this matter let us see if Mrs. Amy has brought herself within the rules of such cases. Our statute in force at that time provides as follows: "Proof of the service of the summons shall be, if served by the Territorial Marshall or Sheriff of the county, the affidavit or certificate of such officer. Second, in case of publication, the affidavit of the publisher, his foreman or principal clerk, showing the same, and the affidavit and the deposit of a copy

of the summons in the post office, if the same shall be deposited. Third, the written admission of the defendant."

There is no order for publication nor never was, the pretended affidavit of the printer as required by our statute is in no way in compliance with the statute. The said statute requires, (see Section 1256 of the laws of 1876 above referred to) that "Said publication shall be in four times consecutively, the first insertion shall be at least forty days before the time to answer, the copy of which shall be immediately deposited postpaid in the post-office directed to the defendant or defendants at their last known place of residence or business."

The affidavit of the printer so defective that appellant didn't try to offer it, reads as follows: See printed transcript page 17, "Edward Pike being first duly sworn upon his oath, says that he is the editor and proprietor of a certain paper, published in the above named county and Territory called the *Silver Reef Miner*, and that he has within the last forty days forwarded to the defendant four different copies of the above named paper at four several times, containing summons in the above entitled action, and that said summons was a copy of the same issued by the clerk of the Probate Court of

Washington County, Utah Territory, and that the same was addressed to the defendant in the above entitled action at Franklin, Idaho Territory." Signed Edward Pike. Subscribed September 2, 1879.

Now if the court will notice there is not the least pretense of any compliance with the statute. 35 Mich 235.

There is no allegation nor showing in the affidavit that the notice was published forty days before the time to answer, or that a copy was immediately forwarded, it simply says that he has within the last forty days forwarded to the defendant four different copies. That affidavit could have been answered and a strict compliance with it could have been observed by the pnblisher sending four copies the week prior to the entry of the judgment. But it will be argued the affidavit said four different copies, they might have been different copies of the same issue; and as we do know the paper was a semi-weekly paper, we are left in doubt to know whether it was four consecutive issues for two weeks or for four. So if there were four copies sent they might cover two weeks. The law did not require more than one copy and the first should have been sent immediately after the notice of publication, which must have been at

least forty days before the time for answer and the affidavit must allege this.

4. Saw., 638.

Nor could this defect be cured by a recital in the judgment if due service had by publicaction even in courts of general jurisdiction.

In the case of Galpin vs. Page, 18 Wal. 365, deemed the leading case on this subject, not only in the United States Courts but in all the courts of this county Mr. Justice Field delivering the unanimous opinion of the court, says, page 368:

"Whenever, therefore, it appears from the inspection of the court, of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance so essential to the protection of parties without the territorial jurisdiction of the court, that we could not have felt disposed to dwell upon it at any length, had it not

been impugned and denied by the Circuit Court." Referring to Galpin v. Page, 1 Saw., 309.

Further on in the same case, the court says:

"When, therefore, by legislation of a state constructive service or process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person or absent party, not a citizen of the state nor within it, every principal of justice exacts a strict and literal compliance of the territoral provisions. And such has been the ruling we believe, of the courts of every state in the Union."

Justice Field then quotes a number of authorities both in California and elsewhere to substantiate this doctrine; and on page 370, the same case, this learned judge says:

"But it is said the court exercised the same function and the same power whether service be made on the defendant personally or by publication, and therefore the same presumption of jurisdiction attended the judgment of the court in the one case as the other. This reasoning would abolish the distinction of the presumption of law when applied to the presumption of a court of general jurisdiction acting in the scope of its

general power, and when applied to proceedings had under special statutory authority; and indeed it is contended that there is no substantial ground for any distinction in any such cases. The distinction, nevertheless has long been made by the courts of the highest character, both in this country and in England, and we had supposed that its existence was not open to discussion. * * * * *

Further on in the opinion the court quotes from the case of Morse vs. Presby, 5 Foster, 392, with approval, in which the court says:

"A court of general jurisdiction may have special and summary powers, wholly derived from statutes, not exercised according to the course of common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it must appear by the record; and every thing will be presumed to be without the jurisdiction which does not distinctly appear to be within it."

The Supreme Court of the United States proceeds to say that:

"The qualification here made that the special powers conferred are not exercised according to the course of the common law is important. When the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers—but where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." * * * *

Still quoting in the same case the court says (page 372)

"The record in the two actions, and of course in the consolidated action, shows that the defendant was thus beyond the reach of the process of the court. All presumption of jurisdiction over her person by the District Court, which otherwise might have been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by the statute such jurisdiction was obtained. The statute provides, in case of absent and non-resident defendants for constructive service or process by publication. It requires an order of court or judge before such publication can be made; it designates the facts which must exist to authorize the order, the manner in which such facts must be made to appear, the period for which publication must be had, and the mode in which the publication must be established. These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is the sole authority for the publication, and which by statute must presbribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence be supplied by proper averment. If there

is any different course of decision in the State it could hardly be expected that it would be followed by a Federal Court, so as to cut off the right of a citizen of another State from showing that the provisions of law, by which judgment has been obtained against him, has never been pursued."

I have quoted fully from the opinion of Galpin vs. Page for the reason as I have before said, this is a leading case on this subject, and is referred to in almost every court in the United States, and particularly by the Supreme Court of the United States and the Circuit and District Courts, of the United States.

In the same volume follows the case of Thompson vs. Whitman, page 457, where the same doctrine is re-announced, iterated and reiterated by the court. I will quote but one or two lines from this case, sufficient, however, to show the court that the doctrine is fully sustained, and that case goes further and denies that the doctrine ever existed in the Supreme Court or any of the courts of the United States, that a recital in the judgment was conclusive on persons *who were not parties to the judgment*, and particularly were the service was by publication or the like. Justice Bradley who delivered the opinion in this case,

and which was unanimously concurred in by all the judges, say:

"In Harris vs. Hardman et. al. 14 Howard, 334, it was a writ of error and the judgment held void by the court for want of service of process on defendant. The subject now under consideration was gone over by Mr. Justice Daniel at some length and several cases in the state courts were cited and approved, which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or, in proceedings in rem, no jurisdiction of the thing."

The court then proceeds to quote the remarks of Justice Daniel at length and cited a large number of cases to sustain this opinion, which I will not here cite, but ask the court if it will kindly refer to them. See page 466-7. Indeed the whole case.

Following this case and sustaining Galpin vs. Page are numerous cases in the Supreme Court of the United States, among which is the case of Earle vs. McVeigh, 91 U. S. 503, where the doctrine of Galpin vs. Page is cited and approved.

Again in the case of Settlenuir vs. Sullivan U. S. 444-449 where this case of Galpin vs. Page is

again cited and approved, particularly as to the point that the record when it disclosed its own defects is fatal to the party that introduced it. In this case the court says: "We do not question the doctrine that a court of general jurisdiction acting in the scope of its authority, that is within the boundries which the law assigns to it in reference to subjects and persons, is presumed to act rightly and to have jurisdiction to render the judgment it renders until the contrary appears, and this presumption can only arise in respect to jurisdictional facts concerning which the record is silent."

So in the case of Cheely vs. Clayton, 110 U. S. 707, the case of Galpin vs. Page was again cited and other cases also, and the court in a elaborate opinion sustains the Supreme Court of Colorado, holding on very technical grounds that the statute in regard to constructive service must be carefully and correctly followed, and the party seeking a benefit under it is bound to show that everything was done that should be done. This was a divorce proceeding and no doubt worked great hardship on some party, but the court did not hesitate from its duty on this account.

Again, in the case of Applegate vs. Lexington etc., Mining Co., 117 U. S. 271, cited by Appellant,

the case of Galpin vs. Page is again mentioned and the doctrine therein announced in regard to constructive service is distinctly enunciated. Listen to what the court says:

"The case of Galpin vs. Page, 18, Wal. 350, cited by counsel for defendant, is not in conflict with this proposition (referring to what had gone before in deciding the case). The judgment set up on the one side and attacked on the other, in that case was rendered on service by publication and the law permitted service to be had by publication only where certain facts were made to appear to the satisfaction of the court, and the court by a precedent order, *which must certainly appear of record*, authorizes service to be made by publication. But the record shows no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual."

Again, in the case of Cuddy petitioner, 131 U. S. 285, the case of Galpin vs. Page is again referred to and cited and cited approvingly.

See in the case of Novle vs. Union River Logging Railroad, in 147 U. S. 173, in which the doctrine announced in Galpin vs. Page is referred to in the following way: "It is true that in every

proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such for example, as the service of process within the state, upon the defendant in a common law action. Authorities: Pennoyer vs. Neff, 95 U. S. 614, and other authorities; the seizure and possession of the res within the bailiwick in a proceeding in rem. Thompson vs. Whitman, supra. A publication in strict accordance with the statute, when the property of an absent defendant is sought to be charged, Galpin vs. Page, supra, and other cases cited above and many cases not and cited.

Other cases in the Supreme Court might be adduced, but I will content myself with now referring to the cases in the Circuit Courts of the United States. Walbur vs. Abbot, 6 Fed. Rep., 814, 816, in which the case of Galpin vs. Page, 18 Wal., is approvingly cited, and announced to be the doctrine of that court. Again in the case of Cissell vs. Pulaski County, 10 Fed. Rep., 893, the court says: "It is a rule without qualification or exception, that if it is sought to conclude a party by constructive service by publication, a strict

compliance with the requirements of the statute is required; nothing can be taken by intendment. Everything necessary for the fact of jurisdiction based on the mode of service, must affirmatively appear in the mode prescribed by the statute; Gray vs. Larimore, 4 Sawyer, 638–46; Steinbeck vs. Leese, 27 Cal., 295; Galpin vs. Page, and many more cases cited by me above and some that are not cited in this brief. See Gray vs. Larimore, supra, Noves vs. Butler, 6 Barber 617; Lowery vs. Cady, 4 Vt. 506, and see also Graham vs. Spencer, 14 Fed. Rep. 605, where the case of Galpin vs. Page is again announced as the doctrine of the courts of the United States. Also the case of Romaine vs. Union etc. Co., 28 Fed Rep., 639, where a great array of authorities are cited, and among them Galpin vs. Page, announcing the doctrine made it that case to be the doctrine of the United States Courts.

Again in the case of Martin vs. Barbour, 34 Fed. Rep., 708, where the doctrine of this case of Galpin vs. Page is approved, and a contrary doctrine came up from the state of Minnesota, is severely criticised and overruled. It says: "The rule is without qualification or exception, that when it is sought to conclude a party by construc-

tive service by publication, a strict compliance with the requirements of the statute is required, and nothing can be taken by intendment, and every fact necessary to the exercise of jurisdiction based on this mode of service must affirmatively appear in the mode prescribed by the statute."

To the same effect are many more cases of the Supreme Courts and Circuit Courts, but I will content myself by citing the court to a few that announce the same doctrine.

I Peters 340; 3 How. 762; 8 How. 681-2; 124 U. S. 220, and cases there cited.

1 Black on judgments 232.

Freeman on judgments 127.

Second.—A party introdncing a record seeking the benifit of it even inform a court of competent jurisdiction, and where service has been had personally when every intendment is in favor of the jurisdiction of the court, the judgment introduced by such party is always open to collateral attack.

In the case of Elliot vs. Peirsol, 340, the court says: "This distinction runs through all the cases and proves that the jurisdiction of any court exercising authority over a subject, may be injuired into in every other court, if a proceeding if the former

are relied on and brought before the latter by a party claiming the benefit of such proceedings."

And in the case of Hiskey's Lessee vs. Stewert 3 How. 756, where they quote this same language, that is, that the jurisdiction of any court exercising authority over the subject may be enquired into every other court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.

The same doctrin is anounced in the case of Thompson vs. Whitman, 18 Wal. 468, that a person who seeks to introduce a judgment in another court from the one in which the decision was made, and expects to derive a benefit under it the record can be inquired into and attacked collaterally.

And the same doctrine is anounced in the case of Guaranty Trust Co. vs. Greene et. al. 139 U. S. 147. The court says: "In reply to the argument that a court in chancery can be looked into in a collateral way, that is a rule well settled in jurisprudence that the jurisdiction in any court exercising authority over the subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such pro-

ceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancy, ecclesiastical or a court of common law, the decisions of these courts upon this subject beginning with the year 1794, have been uniform and consistent. Then the court cites a long line of leading cases on this question, and among them some that we have cited here.

It is hardly necessary for me to add that in this long list of authorities that the affidavit must conform to the statute, and every paper on which it is based, if wanting must be accounted for. The order was not in the record, nor was it accounted for. The pretended affidavit of the publisher was in the record, not offered by appellants, but does not conform to any requirement of the statue.

Third.—Counsel attempted to supply the defect of service by showing orally that the defendant, Butterworth, received copies of the summons. The authorities are universal and without a break, announcing that this is most improper and never allowed.

It is never competent for a court to receive parol testimony to supply the omission of the record, Gray vs. Larimore, 4 Sawyer 638-46, Paine vs. Young, 4 Seldon 158.

There an attempt was made to supply the omission of the affidavit by evidence at the trial that the affiant was in fact the principal clerk of the printer, and such evidence was clearly inadmissible. The statute prescribes the character of the evidence which shall be produced and by whom shall be given. Statutory proof will alone suffice.

The same doctrine is announced in Noyes vs. Butler, 6 Barb, 617; Lowery vs. Cady, 4 Vt. 506; and in the case of Cissell vs. Pulaski County, 10 Fed. Rep's. 893, the court says: "It is not competent for this court to receive parol testimony to supply the omission of the record." Citing the cases I have above quoted and some others, Martin vs. Barber, 44 Fed. Rep's, announced the same doctrine.

So that the offer by the attorneys for Mrs. Amy to supply the omission of the record by oral testimony was void and without a legal precedent.

It leaves the case in this way, that there is no order of court for the publication of summons, nor any attempt to supply the defect, although the clerk of that court is living to day and states in the record that there never was an order. Second, the affidavit does not show what it was bound to show, that the publication was more than forty

days before the default was taken. It does not show it was one day. And third, and most of all, the burden of proof was on them to establish the jurisdiction over an absent defendant which they did not attempt to do.

This respondent must have done according to the doctrine of all the United States Courts, and especially the Supreme Court of the United States.

Turning now to the leading case cited by appellant in the court below, now appellants here, announced, namely: Hahn vs. Kelly, 34 Cal.

The doctrine there announced has been followed, I am aware, by some of the courts in the different states, particularly in Texas, and is the settled rule in California, and was so when our code was adopted in 1870; and would probably, under the rule, be binding upon this court, were it not for the fact that the Supreme Court of the United States has dealt with that question, and positively and emphatically overruled the doctrine therein.

In the case above quoted so fully from by myself, namely Galpin vs. Page, the Supreme Court of the United States was fully informed of the doctrin in Hahn vs. Kelly.

That the court may be certain of that fact allow

me to refer them to the case of Galpin vs. Page, 1 Sawyer 309. In that case the Circuit Court by Sawyer held in effect the doctrine announced in Hahn vs. Kelly, cited as the leading case of respondets and by the Supreme Court of Utah as the leading authority for its opinion. The case went to the Supreme Court of the United States ending in a reversal, which was the cause of a lengthy discussion made by that court in that now celebrated leading authority. 18 Wal. The case was sent back to the Circuit Court where the matter was again reheard before Justice Field, and is found reported in 3 Saw. 93. In that decision Justice Field says:

"But the Supreme Court of the United States in its decision went still forther and held that the rule stated by the Circuit Court, as to the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction, was subject to many exceptions and qualifications and had no application to the case at bar; that such presumptions were limited to jurisdiction over persons who could be reached by their process, and also over proceedings which were in accordance with the course of the common low. In these latter particulars, the decision was an affirmation of doc-

trines asserted by the Circuit Court in an elaborate and carefully considered opinion, delivered in 1895, in the case of Gray vs. Larimore, which grew out of the same rule under the same decree of the District Court which is now before us. The doctrines there asserted were followed in the subsequent case of Gray vs. Murphy, and, until the decision of this case by the present circuit judge, were not regarded as open to contestation in the Circuit Court. In this case they were overruled by him upon the supposed obligation of the court to follow a decision of the Supreme Court of the state in Hahn vs. Kelly, rendered in 1868 (34 Cal. 391). And to that case, frequent reference has been made by counsel on the present trial, and some of its positions have been pressed with great earnestness, as though they were decisive of the points now under consideration. That case was cited to the Supreme Court of the United States. Extracts from the opinion in the case constituted the principal arguement before that court, of one of the counsel of the defendants; and if its positions were not expressly mentioned in the opinion of the court it was not because they had not been carefully considered."

This quotation shows that not only the court

knew of the case of Hahn vs. Kelley, but the same was pressed upon the Supreme Court of the United States, and the doctrine therein announced was fully considered by that eminent court, and emphatically denied.

Of course, with the fall of this case of the Supreme Court of California, all kindred cases based upon the same reasoning must fall to the ground.

In the same case of Galpin vs. Page, 3 Saw, 93, the court deals with the question whether or not the ruling of the Supreme Court of California is binding upon other courts in regard to the laws of the State; and in this decision Justice Field says, quoting fron the Supreme Court of the United States:

"That this court does follow the decision of the highest courts of the States, respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind, that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution or statutes of a State, which the Federal Courts adopt as rules for their own judgments."

Then Justice Field proceeds to say:

"The ruling of the State Court, in Hahn vs. Kelly, except so far as it gives a construction to the State statute, relates to matters of general law, and not to questions of a local character peculiar only to the State."

And again, Justice Field, in the same case, quoting from Christmas vs. Russell, 5 Wal. 305, says:

"The judgments of the courts of one state are not foreign judgments in another state under the Constitution and act of Congress; nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the state where they were rendered; and they are open to inquiry as to the jurisdiction of the court and notice to the defendant."

Justice Field, in the case of Galpine vs. Page, last above referred to, says, referring to the opinion written by Justice Story in Picquet vs. Swan, that "In general it may be said that they authorize no judgment against a party, until after his appearance in court. He may be taken on a capias, and brought into court, or distrained by attachment and other process against his property and compel his appearance; and for non-appearance

be outlawed. But still, even, though a subject and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice and regular personal appearance in court."

And Mr. Justice Field in the case of Galpin vs. Page, 3 Saw., found in 9 Federal cases 438, makes some caustic remarks in regard to the opinion of Justice Sanderson in Hahn vs. Kelly, in his citation from Blackstone to sustain the doctrine of constructive service, as he announced it.

Nor should it be forgotten that this doctrine established by Hahn vs. Kelly in California was without precedent in and against the settled doctrine of its courts.

Jordon vs. Giblin, 12 Cal. 100.
Ricketson vs. Richardson, 26 Cal. 149.
Forbs vs. Hyde, 31 Cal. 342.

Coming to the next point in the brief of respondents in the court below and where I presume will be urged here namely, that courts uphold decrees of divorce, permit me to say, not one of the cases cited by appellants in their brief in the court below so far as I have examined them, sustain

the doctrine contended for in this case.

The general doctrine that courts uphold decrees of divorce is well enough to announce, and is sustained by leading authorities where either one of the parties, after long years of separation, have changed their status relying upon the presumed divorce, courts of law or equity are reluctant to allow the question to be opened and litigated by either of the parties thereto. But this rule does not apply to strangers to the record and especially when the party introducing the record claims a benifit under it; see cases supra.

That Mr. Butterworth, or his wife, Jennie Amy, cannot question the validity of the divorce at this late day no one denies. They are estopped, not because there is a legal divorce, but because, after long years of silence, when new relations have arisen between each party, they will not be allowed at this late day to disturb that which they should have long ago questioned if they desire to do so.

I will close this argument on this point of my brief against respondent, Jennie Amy, by stating that while the courts of California, Arkansas, Texas, and indeed many other states, by *obiter dictum*, hold and maintain the authority contended

for by appellant in the court below but respondent here, and so vigorously asserted in Hahn vs. Kelly, 34 Cal. the leading case on that subject, I deny the doctrine, and I think I have established that the contrary are the better authorities.

The Supreme Court of Utah Territory, Justice King delivering the opinion, see printed transcript, page 29, et seq., take a very broad ground. They practically claim that a judgment from a court of general jurisdiction reciting the fact that service was had upon the defendant cannot be questioned in a collateral proceeding under any circumstances. The court makes no exception to the well known general exceptions to this rule, first that a party claiming a benefit under a judgment and seeking to introduce it in evidence must show that the court had jurisdiction if the judgment is challenged by the opposite party. And, second, that this statement that the judgment imports verity is also open to qualification, that parties not interested in the judgment or privies to it are not inhibited from questioning its validity when a judgment in a collateral proceeding is sought to be used against them.

The Supreme Court of Utah seems to base their opinion upon the allged fact that the Probate

Court of Washington County, Utah, was a court of superior and general jurisdiction. See page 31 of the printed record, where the court speaking through Justice King, say:

"Prior to 1874, under various acts of the legislature the Probate Courts possessed common law and chancery jurisdiction and authority to try and determine criminal cases. While many of these enactments conferring this jurisdiction upon such courts were unconstitutional, they indicate the purpose of the legislature to treat them as courts of general jurisdiction. By the Poland bill they were shorn of all civil, chancery, and criminal jurisdiction excepting in divorce proceedings. From the earliest history of the Territory these courts have exercised jurisdiction in divorce cases, and, though Congress stripped them of powers theretofore exercised, it did not deprive them of jurisdiction in this class of cases until 1887."

And then on page 34 printed transcript, the Court again, say:

"Regarding probate courts as courts of general juridiction the question that naturally suggests itself is, what presumptions attend such courts?"

I do not think it is too much to say that Justice King in delivering the opinion of the Supreme Court, did not seem to grasp the distinction between actions even in courts of general jurisdiction where a defendant is summoned and duly served within the jurisdiction of the Court and where he is called upon to answer a constructive service when the face of the preceedings show he lived and was beyond the jurisdiction of such court and never appered in the action. And as a matter of fact even if all this were true and such statement could be wrranted by the decision of the courts, the Supreme Court of Utah is very much at fault when it holds that Probate courts of Utah ever had common law or chancery jurisdiction or authorized to try and determine criminal cases, or that there jurisdiction was stripped from them by what was known of the Poland bill, with the exception of jurisdiction in divorce preceedings. Nor is it correct that these courts since the earliest history of the Territory have rightfully exercised jurisdiction in divorce cases.

The facts are the Probate courts were organized as courts of limited jurisdiction by the organic act of the Territory of Utah, and chancery and common law jurisdiction was conferred by that act

upon the District courts and the Supreme Court of the Territory. The legislature truly undertook to give Probate Courts concurrent jurisdiction with the District courts, but these enactments of the leglislature were absolutely void, but such jurisdiction was never conferred upon the Probate Courts. In proof of this statement, if proof is needed, I need only refer to the case of Ferris v. Higley, 20 Wal, 375, where the Supreme Court of the United States, speaking through Justice Miller say:

"The act of the Territorial Legislature conferring on the Probate Courts a general jurisdiction in civil and criminl cases both in chancy and common law is inconsistent with the organic act and is therefore void."

See Cast vs. Cast, 1 Utah, 112.

Nor did the act of Congress continue the jurisdiction of the Probate Courts in divorce matters. On the contrary, by act of Congress, entitled "An Act in relation to courts and judicial officers in the Territory of Utah, approved June 3, 1864, and usually known in Utah as the Poland bill, the third section provides that Probate Courts in their respective counties shall have jurisdiction in the settlements of estates of decedents, etc. Virtually

re-enacting the organic law of the Territory, and then adding jurisdiction in divorce, and then provides, on latter part of the section, page 104, That all judgments and decrees heretofore rendered by Probate Courts which have been executed and time for appeal from which has been by existing law of said Territory expired, are hereby validated and confirmed."

Without going further into this opinion I will close this brief by saying I deny that it ever was the law in any civilized country, especially where the common law has force, that a judgment of courts of even general and unlimited jurisdiction import absolute verity under all conditions and circumstances. There has always been exceptions to this general rule, and one of the many ones is that when the face of the judgment itself shows that the defendant was beyond the process of the court, beyond the jurisdiction of the sovereignity that gave it existence, and there is no appearance of the defendant and the record discloses that there was no effort made to conform to the law to obtain constructive service, such judgment can always be questioned by parties not privy to it, indeed by the defendant himself if he can show, which he has a right to show, that he never was

served or appeared in the case.

I am aware there is some dicta of the courts to the contrary, and there may be and are no doubt some cases that go to the length claimed by the Supreme Court of Utah; but these cases are not sustained by respectable authority nor by reason nor by the just anologies with the law.

Respectfully submitted,

LE GRAND YOUNG,

Attorney for Appellants.